United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4107

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

ANTONIO MARTINEZ,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the Board of Immigration Appeals

B
P/S

BRIEF FOR PETITIONER AND JOINT APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

September Term, 1975

Docket No. 75-4107

ANTONIO MARTINEZ,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

PETITIONER'S BRIEF

Statement of the Issues

I

Whether the Board's refusal to grant petitioner's motion to reopen deportation proceedings to apply for suspension of deportation on the ground that he was not eligible for the relief requested was erroneous.

II

Whether the Board erred in refusing to grant petitioner's motion to reopen deportation proceedings to apply for suspension of deportation in view of the failure of the Immigration Judge at the deportation proceedings to inform petitioner of his eligibility to apply for such relief as required by regulation, and thus denied petitioner the right to a fair hearing and due process of law.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Naturalization Act (the Act), 8 U.S.C. 1105A(a), Antonio Martinez petitions this Court for review of a final order of the Board of Immigration Appeals, entered on May 1,1975, and an amendatory order issued for the purpose of clarification on May 28,1975, dismissing an appeal from the decision of an Immigration Judge, dated February 20,1975, which denied petitioner's motion to reopen deportation proceedings.

The petitioner had sought to reopen the deportation proceeding for the purpose of applying for the discretionary relief of suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). In dismissing the petitioner's appeal, the Board of Immigration Appeals affirmed the decision of the Immigration Judge with a per curiam order.

The petitioner contends that the Board's order should be set aside because (1) the Immigration Judge's failure to inform petitioner of his eligibility to apply for suspension of deportation as required by regulation deprived him of his right to a fair hearing and due process of law, and, (2) the government's conclusion that petitioner was not eligible for relief sought was erroneous.

Statement of Facts

Petitioner Antonio Martinez is a native and citizen of the Dominican Republic. He entered the United States at San Juan, Puerto Rico on January 25, 1967 as a nonimmigrant visitor for pleasure, with authorization to remain in the United States until July 24, 1967.

On October 31, 1974 deportation proceedings were commenced by the Immigration and Naturalization Service (the Service) pursuant to §242(b) of the Act, 8 U.S.C. §1252(b), by the issuance of an Order to Show Cause and notice of hearing charging that petitioner was subject to deportation for having remained in the United States for a longer time than permitted.

At a deportation hearing held on November 1, 1974 petitioner conceded the allegations and the charge contained in the Order to Show Cause and requested the privilege of departing voluntarily at his own expense. The evidence adduced at the hearing showed that petitioner had resided in the United States for almost 8 years; owned his own apartment; had a brother and other relatives in the United States; that he was unemployed due to a back injury in 1967 which caused him ill health; and that he was married to a United States citizen who had filed a visa petition in his behalf with the Service, but such petition had been withdrawn by her prior to the hearing.

The Immigration Judge granted petitioner's application for the privilege of voluntary departure on or before December 27, 1974.

Subsequently, the petitioner's relationship with the attorney who represented him at the deportation hearing terminated

and he retained present counsel. On December 27, 1974 petitoner moved to reopen deportation proceedings for the purpose of applying for suspension of deportation. In his moving papers he alleged that he had been continuously present in the United States since January 25, 1967, that he was a person of good moral character, and that his deportation would result in extreme hardship.

On February 20, 1975 the Immigration Judge issued a decision denying petitioner's motion to reopen deportation proceedings. The basis of the denial was that since the petitioner was a native of the Dominican Republic which is an adjacent island as defined in §101(b)(5) of the Act, that in order to be eligible for the relief sought he was required to establish ineligibility to obtain a special immigrant visa. Since the record showed that petitioner was still married to a United States citizen the possibility existed that he still may be exempt from the requirements of obtaining a labor certification under §212(a)(14) of the Act. The hearing officer took this position even though the record indicated that a visa petition filed by the petitioner's citizen wife to determine whether or not he was entitled to special immigrant status had been withdrawn by her. A further objection by the Immigration Judge was that the motion papers failed to adequately spell out the details of the extreme hardship which would be suffered by petitioner if deported.

From this decision an appeal was taken to the Board of Immigration Appeals. In the appeal it was pointed out that petitioner had instituted an action for divorce against his wife, and on February 6, 1975 in the Supreme Court of the State of New York a

decision was rendered in his favor and only awaiting the Judge's signature. Additionally, it was brought to the Board's attention that the positions he has occupied in the United States have been of an unskilled nature, ranging from dishwasher to machine operator, none of which would entitle him to an approved labor certification filed by a prospective employer. Consequently, it was contended that petitioner was ineligible for special immigrant status.

On May 1, 1975 the Board affirmed the decision of the Immigration Judge in a per curiam order. Subsequently on May 28, 1975 an amendatory order was issued by the Board for the purpose of clarification.

This petition for review, which seeks review of the denial of petitioner's motion to reopen to apply for suspension of deportation followed.

Relevant Statutes

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended;

Section 244, 8 U.S.C. §1254:

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and -
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceeding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;
>
> * * * *
>
> (f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman subsequent to June 30,1964, or (2) was admitted to the United States pursuant to section 101(a)(15)(J) or has acquired such status after admission to the

United States; or (3) is a native of any country contiguous to the United States or of any adjacent island named in section 101(b)(5); Provided, That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.[1/]

Section 212, 8 U.S.C. §1182:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified,

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1/ The 1969 Committee Print of the Immigration and Nationality Act for the use of the Committee on the Judiciary of the House of Representatives used the term "nonquota" immigrant visa instead of "special" immigrant visa. However, analysis of various changes made in the Act shows that within the meaning of section 244(f)(3) the terms "nonquota" and "special" are synonymous. See Matter of Brandi, Int. Dec. 2325.

and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in Section 101 (a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in Section 203 (a)(3) and (6), and to non-preference immigrant aliens described in Section 203(a)(8).

Relevant Regulations

Title 8, Code of Federal Regulations (CFR):

§242.17 (a) Creation of the status of an alien lawfully admitted for permanent residence. The respondent may apply to the special inquiry officer for suspension of deportation under section 244(a) of the Act, for adjustment of status under section 245 of the Act, or under section 1 of the Act of November 1,1966, or of creation of a record of lawful admission for permanent residence under section 214(d) or 249 of the Act; such applications shall be subject to the requirements contained in Parts 244,245, and 249 of this chapter. In conjunction with such applications, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes he meets the eligibility requirements for a waiver of the ground of inadmissibility, he may apply to the special inquiry officer for such waiver. The special inquiry officer shall inform respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application, therefor during the hearing..."

§3.2. Reopening or reconsideration. The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner, or any

other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

A R G U M E N T

POINT I

THE BOARD'S REFUSAL TO GRANT PETITIONER'S MOTION TO REOPEN DEPORTATION PROCEEDINGS TO APPLY FOR SUSPENSION OF DEPORTATION WAS ERRONEOUS SINCE IT WAS BASED ON THE MISTAKEN CONCLUSION THAT PETITIONER WAS NOT ELIGIBLE FOR THE RELIEF REQUESTED.

A. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. §1254(a) is a form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. Hinotopoulos v. Shaughnessy, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. §1254(c); McGrath v. Kristensen, 340 U.S. 162 (1950).

To be eligible for suspension of deportation under Section 244(a)(1) of the Act, 8 U.S.C. §1254(a)(1) the petitioner must establish, inter alia: (1) physical presence in the United States for a continuous period of not less than seven years immediately preceding the date of his application; (2) good moral character during all that period; and (3) extreme hardship to petitioner or other specified family members, which would result from his deportation.

Since the petitioner is a native of the Dominican Republic, an adjacent island named in section 101(b)(5) of the Act, 8 U.S.C. §1101(b)(5) he must further establish that he is ineligible to obtain a special immigrant or nonquota visa as required by section 244(f) of the Act, 8 U.S.C. §1254(f).

B. Petitioner met the requirements under the general provisions of law relating to suspension of deportation.

The discussion to follow concerning the petitoner's eligibility for the relief sought should be read in light of and carried over to petitioner's further argument in Point II, i.e., that the Immigration Judge committed an error of law in failing to adivse the petitioner at the deportation proceedings of his "apparent" eligibility to apply for suspension of deportation as required by regulation.

There appears to be no dispute that petitioner has been physically present in the United States for the required period of time. As far as establishing his good moral character, in order for him to have been granted voluntary departure by the Immigration Judge, he must have ipso facto, established such requirement.[2/] The same character standard is fixed for suspension of deportation.[3/]

The extreme hardship that would result if petitioner was compelled to depart the United States, unfortunately was not fully brought out in the deportation hearing due to the failure

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2/ §244(e) of the Act, 8 U.S.C. 1254(e).

3/ Gordon & Rosenfield, Immigration Law and Procedure, §7.9(d)(1975)

of the Immigration Judge to adivse petitioner of his right to apply for such relief. However, the record shows that petitioner was injured in 1967 and has suffered ill health ever since. In Matter of S, 5 I. & N. Dec. 409 and Matter of U, 5 I. & N. Dec. 413, the Board of I-migration Appeals announced general criteria to be weighed in assessing whether extreme hardship is present. Relative to petitioner's case, one of the criteria set forth was the health and age of the applicant.

C. Petitioner met the special requirement of law relating to natives of an adjacent island.

In denying the motion to reopen the Immigration Judge gave great weight to the fact that since petitioner was a native of an adjacent island named in the Act he had failed to satisfy the requirements of Section 244(f) 8 U.S.C. §1254(f) that he establish ineligibility to receive an immigrant visa. The Judge was of the opinion that since petitioner was still married to a United States citizen he was exempt from Section 212(a)(14) of the Act, 8 U.S.C. &1182(a)(14). This was so even though the citizen wife had withdrawn her visa petition which would have exempted him from any immigrant quota restrictions.

Section 212(a) of the Act, 8 U.S.C. §1182(a) provides for those classes of aliens who are ineligible to receive a visa. Subsection (14) of Section 212(a) of the Act was enacted by Congress to protect the domestic labor market. In substance, the section excludes from the United States any alien seeking to tneter for the purpose of performing skilled or unskilled labor unless a

certification issued by the Secretary of Labor has determined that there are not sufficient workers in the United States to perform the skilled or unskilled labor and that the employment of such alien will not adversely affect the labor conditions of workers similarly employed. The section exempts from its provisions those aliens who are the parents, spouses, or children of United States citizens or aliens who are permanent residents. Consequently, the Immigration Judge believed that since petitioner was married to a United States citizen he was exempt from the provisions of the section.

In petitioner's appeal to the Board it was pointed out that petitioner had obtained a judgment of divorce from his wife which was awaiting the Judge's signature.[4/] Consequently, it was argued that petitioner was no longer one of those persons exempted from the necessity of obtaining a Labor Certification. In this regard, the fact the petitioner's divorce was not final does not appear to be relevant since the position of the Service is that in order to gain any benefits from a marriage to a United States citizen the parties must be residing in a marital union. This position is emphasized in the Board's decision in the Matter of Lear, 11 I.& N. Dec.148, wherein it stated that a study of the provisions of the Act and the legislative history leading to its enactment clearly evidences a desire to retain and unite family units. To accomplish this objective, aliens married to United States citizens have been given special consideration and made

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4/ To bring the record up to date petitioner's divorce became final on February 26, 1975.

exempt from quota restrictions. Since the objective of Congress was the preservation of the family unit, the Congress only intented to confer benefits where a bona fide relationship existed in fact as well as in law, and that the family relationship exist right up to the time that permanent status was acquired. Consequently, the Board denied immigration benefits to an alien married to a United States citizen where said alien was the subject of an interlocutory decree of divorce and not residing with her spouse.

In the appeal to the Board it was indicated that the positions petitioner has occupied in the United States have been of an unskilled nature, ranging from dishwasher to machine operator, none appearing to entitle him to an approval of a labor certification and thus exempting him from the exclusionary provisions of section 212(a)(14) of the Act.[5/]

It was proper for the Board to take into consideration the fact of petitioner's divorce decree and his apparent ineligibility to obtain a labor certification since unlike an Appellate Court, the Board is authorized to make a de novo review and make independent findings of fact and conclusions of law. In arriving at a decision it may pass on matters not presented to the Immigration Judge.[6/]

5/ 29 CFR 60.7 contains a list of occupations for which a labor certification will not issue known as Schedule B. Included in this list are dishwashers and machine helpers.

6/ Gordon & Rosenfield, Immigration Law and Procedure, §1.10 (1975)

POINT II

THE BOARD ERRED IN REFUSING TO GRANT PETITIONER'S MOTION TO REOPEN DEPORTATION PROCEEDINGS TO APPLY FOR SUSPENSION OF DEPORTATION IN VIEW OF THE FAILURE OF THE IMMIGRATION JUDGE AT THE DEPORTATION PROCEEDINGS TO INFORM PETITIONER OF HIS ELIGIBILITY TO APPLY FOR SUCH RELIEF AS REQUIRED BY REGULATION, AND THUS DENIED PETITIONER THE RIGHT TO A FAIR HEARING AND DUE PROCESS OF LAW.

Section 242 (b) of the Immigration and Nationality Act, 8 U.S.C. §1254(b) and the regulations enacted thereunder contained the procedural pattern for the conduct of deportation proceedings. The regulations promugalted by the Attorney General are binding on all immigration officers and have the affect of law. Jay v. Boyd, 351 U.S. 345 (1956), Accardi v. Shaughnessy, 347 U.S. 260 (1954), Matter of Tzimas, 10 I.& N. Dec.101. Although, innocuous deviations which do not effect any material right may not invalidate a proceeding, the procedures announced in the regulations must be followed and any substantial variance is a denial of due process and negates a fair hearing. Accardi v. Shaughnessy, supra; Bridges v. Wilson, 326 U.S. 135 (1945); Fragale v. Rogers, 175 F. Supp.6[illegible] (E.D.N.Y. 1959).

8 CFR 214.17 mandates that the Immigration Judge shall inform a respondent at the deportation hearing of his apparent eligibility to apply for any of the benefits enumerated in the section and shall afford him an opportunity to make an application therefor during the hearing. One of the benefits enumerated in the

regulations is suspension of deportation. Additionally, 8 CFR 3.2 provides in pertinent part that a reopening will not be granted by the Board of Immigration Appeals if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the deportation hearing.

As previously discussed, it appears beyond question that petitioner met the eligibility requirements to apply for suspension of deportation. Whether or not he would be granted such relief as a matter of discretion is immaterial since this determination can only be made at a hearing wherein petitioner can present testimony and evidence relevant to his application. The regulation speaks only of an alien's "apparent" eligibility and does not contemplate that an alien conclusively establish that he is entitled to a grant of such relief.

It has been indicated that suspension of deportation is an extraordinary and ultimate form of relief available to an alien. An approval of his application results in his deportation being cancelled and the obtaining of permanent residence in the United States without having to leave the country. Consequently, the failure of the Immigration Judge to inform petitioner of his apparent eligibility to apply for suspension of deportation coupled with the failure of the Board of Immigration Appeals to reopen deportation proceedings in view of such ommission deprived petitioner of a substantial right and thus constituted a denial of due process of law and the right to a fair hearing. In Fragale v. Rogers, supra, the Immigration Judge failed to

advise the alien of her right to take an appeal from his decision. In reversing this decision, the Court stated that the law required the special inquiry officer to advise the alien of her right to take an appeal from his decision and his failure to do so was reversable error.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE GRANTED AND THE CASE REMANDED TO THE BOARD OF IMMIGRATION APPEALS FOR THE PURPOSE OF REOPENING DEPORTATION PROCEEDINGS TO PERMIT PETITIONER TO APPLY FOR SUSPENSION OF DEPORTATION.

Respectfully submitted,

POLLACK & KRAMER, ESQS.
Attorneys for Petitioner
225 Broadway
New York, New York 10007

MILTON DAN KRAMER

- Of Counsel -

MPM:ml
75-2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIO MARTINEZ, Petitioner,	:	
- v -	:	PETITION FOR REVIEW OF ADMINISTRATIVE AGENCY ACTION
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	:	Docket No. 75-4107

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2. Warrant of deportation dated May 20, 1975.

3. Decision of the Board of Immigration Appeals dated May 1, 1975.

4. Notice of Appeal to the Board of Immigration Appeals dated March 7, 1975.

5. Order denying motion to reopen by Immigration Judge dated February 20, 1975.

6. Service brief in opposition to motion to reopen proceedings dated January 28, 1975.

7. Motion to reopen dated December 27, 1974.

8. Notice of entry of appearance as attorney or representative dated December 20, 1974.

MPH:al
75-2023

9. Transcript of hearing dated November 1, 1974.

10. Decision of the Immigration Judge dated November 1, 1974.

11. Order to show cause dated October 31, 1974.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MCGUIRE,
Special Assistant United States Attorney,
of Counsel.

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A21 709 129 - New York

In re: ANTONIO [redacted]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: [redacted], Esq.
[redacted]
225 [redacted]
New York, New York 10007

CHARGE:

Order: Section 241(a)(2), INA Act (8 U.S.C. 1251(a)(2)) - Remained, nonimmigrant visitor - remained longer than permitted

[redacted]

ORDER: On the Board's own motion, for the purpose of clarification, our order of May 1, 1975, is amended by the substitution of the following after the word "DEPORTATION."

Motion to reopen to apply for suspension of deportation.

Chairman

A-3 ONLY COPY AVAILABLE

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A21 703 120 - New York

MAY 1 - 1975

In re: ANTONIO [redacted]

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Milton Ben Mermer, Esq.
[redacted] & Mermer
[redacted] Broadway
New York, N.Y. 10007

CHARGE:

ORDER: Section 241(a)(2), INA Act (8 U.S.C. 1251 (a)(2)) - Remained longer than permitted

APPLICATION: Voluntary departure in lieu of deportation

ORDER:

PER CURIAM. The decision of the immigration judge is affirmed. The appeal accordingly is dismissed.

Chairman

ONLY COPY AVAILABLE

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

20 West Broadway

New York, NY 10007

Fee Stamp

In the Matter of:

ANTONIO MARTINEZ

File No. A21 769 129

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated February 20, 1975, in the above entitled case.

2. Briefly, state reasons for this appeal.

SEE SEPARATE BRIEF.

3. I do not (do / do not) desire oral argument before the Board of Immigration Appeals in Washington, D. C.

4. I am (am / am not) filing a separate written brief or statement.

Signature of Appellant (or attorney or representative)

POLLACK & KRAMER
(Print or type name)

March 7, 1975
Date

225 Broadway, New York, NY 10007
Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 2-15-71)N

RE: MARTINEZ, Antonio

A21 769 129

B R I E F

At the deportation hearing held on November 1, 1974, respondent was represented by counsel other than this law firm. At that time, respondent was prima facie eligible to apply for suspension of deportation since his last entry into the United States was on January 25, 1967. However, no application for this relief was made. Why this occurred cannot be determined.

At the time of the deportation hearing a visa petition filed by respondent's citizen wife had already been withdrawn by her. Consequently, respondent was no longer eligible for immediate relative status. Furthermore, respondent has instituted an action for divorce against his wife, and on February 6, 1975 in the Supreme Court, State of New York, a decision was rendered in his favor. Respondent is awaiting signing of the order.

The respondent is not the beneficiary of any approved labor certification. The positions he has occupied in the United States have been of an unskilled nature, ranging from dishwasher to machine-operator, none entitling him to an approval of a labor certification filed by a perspective employer.

Respondent, having been born in the Western Hemisphere can qualify for an immigrant visa in the following wasy. By marriage to a United States citizen, or a permanent resident; being the father of a legitimate child born in the United States; or the beneficiary of an approved labor certification. Respondent does not come within any of these categories, and, consequently, in no way qualifies for "special immigrant status."

Matter of Majar 13I&N737, cited by the Immigration Judge is inapplicable because in that case the respondents who were natives of the Western Hemisphere were exempt from the provisions of Section 212(a)(14) of the Act since they were the parents of an United States citizen child.

Respondent does not wish to try his case in motion papers. All he is requesting is that he be given an opportunity to apply for suspension of deportation which was denied to him at the time of his original hearing. Elementary fairness would appear to dictate this course of action.

Respectfully submitted,

MILTON DAN KRAMER
Attorney for Respondent

New York, NY March 7, 1975.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

FEB 2 0 1975

Antonio Martinez Respondent - In Deportation Proceedings	File No. : A 21 769 129 - New York In Behalf of Respondent: Pollack & Kramer, Esqs., 225 Broadway New York, N. Y. In Behalf of Service: John K. Speer, Esq., Trial Attorney

ORDER DENYING MOTION TO REOPEN

The respondent is a native and citizen of the Dominican Republic who last entered the United States on January 25, 1967 as a visitor for pleasure who was authorized to remain until July 24, 1967. He remained beyond that date without permission thereby becoming subject to deportation on the charge contained in the Order to Show Cause.

He was accorded a hearing in deportation proceedings on November 1st, 1974, conceded deportability as charged and asked for voluntary departure from the United States. He was granted that privilege and was required to depart from the United States on or before December 27, 1974.

On that very day Counsel for respondent submitted a motion to reopen these proceedings to enable the respondent to apply for suspension of deportation.

The motion papers allege that he was continuously present in the United States since January 25, 1967 and that he is a person of good moral character and that his deportation would result in extreme hardship to himself.

However, the respondent is a native of the Dominican Republic which is an adjacent island as defined in Section 101(b)(5) of the Act, and consequently he is ineligible for suspension of deportation unless the Attorney General is satisfied that he is ineligible to obtain a special immigrant visa. The motion papers indicate that as of October, 1974, the respondent was still married to a United States citizen. It is true that she withdrew the visa petition which she had previously submitted in his behalf but the marital status did exist as of that time and it would appear that the respondent may still be exempt from the requirements of a labor certification. The

more fact that he might have to wait more than two years for the issuance of a visa does not make him ineligible to obtain a special immigrant visa within the meaning of Section 244(f)(3) of the Act. See Matter of [redacted], 13 I & N Dec. 1337.

Furthermore, although the respondent's motion paper alleges extreme hardship to himself, the respondent has the bare minimum required for suspension of deportation and the motion papers do not in any way spell out the details of the extreme hardship.

I find therefore that the motion papers are inadequate to sustain the motion to reopen and the motion will be denied.

ORDER: IT IS ORDERED that the motion to reopen these proceedings be, and the same hereby is, DENIED.

IRA FIELDSTEEL
Immigration Judge

New York, N. Y. - 2/20/75
A-21 769 129

In the Matter of)

MARTINEZ, Antonio) A21 769 129

Respondent)

MOTION TO REOPEN

This is a Motion to Reopen deportation proceedings in behalf of the above-named respondent for the purposes of applying for suspension of deportation under Section 244(a) of the Act.

The respondent entered the United States on January 25, 1967 and has been physically present since that date. He is a person of good moral character and deportation would result in extreme hardship to himself.

Respectfully submitted,

Milton Dan Kramer

MILTON DAN KRAMER

(7)

File No. A 1 769 129

UNITED STATES OF AMERICA:

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

In the Matter of

MARTINEZ, ANTONIO

Respondent.

In Deportation Proceedings Under Section 242 of the Immigration and Nationality Act

DECISION OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions I have determined that he is deportable on the charge(s) in the Order to Show Cause.

Respondent has made application solely for voluntary departure in lieu of deportation.

ORDER: It is ordered that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before DEC 7 1977
(Date)

or any extension beyond such date as may be granted by the district director, and under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to [illegible] on the charge(s) contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, the respondent shall be deported to _____.

Copy of this decision has been served on respondent.

Appeal: Waived-~~reserved~~

Date: NOV 1 1977

Place: [illegible]

[illegible]
(Immigration Judge)

[illegible] DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A- [illegible]

In the Matter of Antonio

-Respondent-

IN Deportation

TRANSCRIPT OF HEARING

Before: Ira Hollstein, Immigration Judge

Date: November 1, 1971 Place: [illegible], 20 West Broadway, New York,

Transcribed by P. J. Killela Recorded by IDM Magnabolt

Official Interpreter Anthony A. Alvarenga

Language Spanish

APPEARANCES:

For the Service:

(Acting Trial Attorney)

Trial Attorney

Station

For the Respondent:

Harry J. Oppenheim, Esq.,

57 Park Place

New York, N Y., 10007

Form I-213

IMMIGRATION JUDGE TO RESPONDENT: (through Spanish interpreter):

Q Your language is Spanish, sir?

A Yes, sir.

Q Wait for the interpreter. I know you can speak some English. Your name is Antonio Martinez?

A Yes, sir.

Q And did you get a copy of this paper from the Immigration Service yesterday?

A Yes, here it is.

Q Is Mr. Oppenheim your attorney?

A Yes.

IMMIGRATION JUDGE: Counsel, what are you looking for in this case?

MR. OPPENHEIM: I would like a bond reduction for $500 on the basis that he has been in the United States for almost eight years. He owns his own apartment. His brother lives here in New York also. He has other relativ and right now he is not working because his health is not good and I believe he is a good risk, and he is willing to leave from the United Stat voluntarily. However he is only willing if you allow him.....

IMMIGRATION JUDGE: Why is the bond here fifteen hundred?

MR. TRIAL ATTORNEY: ah there is a question here of a bad marriage, judge, the petition was withdrawn. I spoke to,...

IMMIGRATION JUDGE : Well, this is the same story we had yesterday. In other words there is a difference between a marriage that goes sour and a fraudulent marriage?

MR. TRIAL ATTORNEY: Well on the basis it was withdrawn and I did speak t the attorney here , and we didn't go into it too much and I was satisfied

with five hundred reduction and thirty days to go.

IMMIGRATION JUDGE: Well, how about that, Mr. Oppenheimer, is it agreeab

MR. OPPENHEIM: O. K. It's agreeable.

IMMIGRATION JUDGE: My thirty days is normally from - it would be Decemb 22nd. Well let's find out from him.

IMMIGRATION JUDGE TO RESPONDENT:

Q Mr. Martinez, if I give you until let's see, until December 27th, will you leave?

A Yes, I will.

IMMIGRATION JUDGE: I assume you concede deportability as charged, Counse

MR. OPPENHEIM: Yes, your honor.

IMMIGRATION JUDGE TO RESPONDENT:

Q How long have you been sick?

A Since 1967 I don't feel very well.

Q What is the nature of your sickness?

A Since 20th of December of 1967. They asked me to make a delivery. I hurt my back. Something fell on my back. I lost my senses. And I do know what happened after that.

Q Well, have you been on workmen's compensation since then? Or relief or what, for your support?

A ---

MR. OPPENHEIM: He explained to me that he is not working now and he sto working about a month ago, due to an accident that he had right after he into the United States?

IMMIGRATION JUDGE: I know that, but what I am trying to find out is ho he supporting himself since. Wait a minute, let me get it from him.

IMMIGRATION JUDGE TO RESPONDENT:

Q After your accident, were you getting Workmen's Compensation, did you get money from the State every week? Or every month?

A Well I was receiving for almost a month.

Q And after that month you didn't get any more money?

A After that was over I was given $3,000. The lawyers took part of it and gave me the other part.

Q Well, all I am saying is that is not enough for anybody to live on even for a year. How were your supported the rest of the time?

A Two months after they settled my case, I had to go to work.

MR. OPPENHEIM: Up to one month ago. Apparently he had to stop working, apparently he got worse.

IMMIGRATION JUDGE: All right.

IMMIGRATION JUDGE TO RESPONDENT:

Q Now if you don't leave, and you have to be deported, where do you want the government to send you?

A To the Dominican Republic.

Q I am so glad to hear that you consider it shameful to be deported. We do hear that once in a while.

IMMIGRATION JUDGE: Final order?

MR. OPPENHEIM: Yes, sir, your honor.

IMMIGRATION JUDGE: TO RESPONDENT:

Q I have also reduced your bond to $500, do you understand?

A I understand.

IMMIGRATION JUDGE: Hearing closed.

MR. OPPENHEIM: Thank you very much.

I certify the foregoing three pages numbered ONE through THREE is a complet and accurate transcript of the within proceeding held in MASH court room on November 1, 1974.

Patrick J. Killela
Transcriber

FORM I-299 (REV. 8-65)

TRANSCRIPT OF HEARING
United States Department of Justice -- Immigration and Naturalization Service

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A 21 769 129

In the Matter of MARTINEZ, Antonio Respondent.

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Dominican Republic and a citizen of Dominican Republic;
3. You entered the United States at San Juan, Puerto Rico on or about 1/25/67 (date);
4. At that time you were admitted as a nonimmigrant visitor for pleasure.
5. You have been authorized to remain in the United States until 7/24/67.
6. You remained in the United States thereafter without authority.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Sec. 101(a) (15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 20 W. Broadway, New York, N.Y., 14th floor on November 1, 1974(S) at 1:00 p.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: October 31, 1974

Henry E. Wagner
(Signature and title of issuing officer)
ASSISTANT DISTRICT DIRECTOR
FOR INVESTIGATIONS, N.Y.C.
(City and State)

APPEAR WITH PASSPORT AND IMMIGRATION DOCUMENTS

Form I-221S (12-1-73) (over)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS. THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES.

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated thereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation, including the privilege of departing voluntarily, for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, pending your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is sought, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☐ Released under bond in the amount of $ 1500.00

You may request the Immigration Judge to redetermine this decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

☐ I do ☐ do not request a redetermination, by an Immigration Judge of the custody decision.

Before: _____
(signature of respondent)

_____
(signature and title of witnessing officer)

_____
(date)

CERTIFICATE OF SERVICE

Served by me at _____ on _____ 19____ at _____ m.

_____
(signature and title of employee or officer)

ONLY COPY AVAILABLE

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIO MARTINEZ,

Petitioner,

- against -

IMMIGRATION AND NATURALIZATION SERVICE.

Respondent.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 12 *day of* Jan *19*76 *at* 1) 1 St. Andrews Plaza, N.Y., N.Y.
2) 1 St. Andrews Plaza, N.Y., N.Y.

deponent served the annexed Brief and Joint Appendix *upon*
1) U.S. Attorney for the Southern District
2) Immigration and Naturalization Service

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 12th
day of January *19* 76

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977